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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Adoption of A.W., a Minor.

E.T. et al.,

Petitioners and Respondents,

v.

R.W.,

Objector and Appellant.

E065679

(Super.Ct.No. RIA1500002)

OPINION

APPEAL from the Superior Court of Riverside County. Eric V. Isaac, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Remanded with directions.

Shobita Misra, under appointment by the Court of Appeal, for Objector and Appellant.

David A. Goldstein for Petitioners and Respondents.

A juvenile court granted a petition brought pursuant to Probate Code section 1516.5 to declare A.W. (the child) free from the care, custody, and control of her biological parents, R.W. (father) and E.T. (mother). Father now appeals the judgment

since the court failed to comply with the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) We order a limited remand of the case to the trial court to comply with the inquiry provisions of ICWA.

FACTUAL AND PROCEDURAL BACKGROUND

The child was born in 2007. Mother had a stroke when she was pregnant with the child, and it left her disabled. Mother's brother, E.T., and his wife, J.T. (Mr. and Mrs. T), intervened to help mother care for the child. Father was in and out of jail and, when the child was about one year old, he went to prison.

In 2009, J.T. obtained guardianship of the child, and the child has been in Mr. and Mrs. T's care ever since.

On January 6, 2015, Mr. and Mrs. T filed an adoption request for the child. The form asked whether the child had Indian ancestry, and they answered, "No." Mr. and Mrs. T also filed an ICWA-020 form, which stated that they had no Indian ancestry; their counsel filed an ICWA-010 form, which stated that the child had no known Indian ancestry.

On May 18, 2015, the California Department of Social Services filed a report pursuant to Family Code section 7663, which stated the results of its inquiry into the identity and whereabouts of mother and father. The adoptions specialist reported that mother was in agreement with the adoption and would sign the consent forms. Father was sent a letter advising him of the adoption. He replied in a letter stating that he did not want the child to be adopted, that he would be getting out of prison in a few months, and he planned to request full custody.

On June 4, 2015, Mr. and Mrs. T filed a petition to have the child freed from parental custody and control, pursuant to Probate Code section 1516.5 (the petition). The petition stated that the child had resided with them since 2008, that father had been incarcerated since 2009, and that mother had minimal contact with the child. A hearing was set for August 7, 2015, and the parents were served with notice.

On August 7, 2015, the Riverside County Probation Department filed a report stating that Mr. and Mrs. T had provided the child with a nurturing and stable home since she was one year old, and she wanted to stay with them permanently. Father had no contact with the child since he was incarcerated in 2009. The probation officer recommended termination of parental rights. The report contained no mention of ICWA.

At the August 7, 2015 hearing, mother was present. Counsel for Mr. and Mrs. T informed the court that she was consenting to termination of parental rights, but father was objecting. The court appointed counsel for father and the child, and then continued the matter.

At a hearing on September 4, 2015, father's counsel set the matter contested.

At a hearing on December 3, 2015, father was not present, but his counsel informed the court that he was released from custody in October. Father wanted to testify, but was not able to be in court that day because he was staying in a halfway house or shelter. The court granted counsel's request for a continuance.

The continued hearing was held on January 6, 2016. Father was represented by counsel, and father appeared telephonically. He requested another continuance, which the court granted.

The court held a hearing on the petition on February 18, 2016, and father appeared with counsel. The court heard testimony from Mrs. T and father. It then concluded that it was in the child's best interest to terminate parental rights and grant the petition.

ANALYSIS

The Matter Should Be Remanded for the Court to Comply With ICWA

Father's sole contention on appeal is that the judgment must be reversed due to the failure of the trial court to ask him if the child may have Indian ancestry. He is now asserting that he may have Indian ancestry through his father. He argues that since the court failed to comply with the notice and inquiry requirements of ICWA, this court should order a limited remand, with directions for the trial court to comply. We agree.

At the outset, we note that no claim was made in the trial court that the child had Indian ancestry. However, "[c]ase law is clear that the issue of ICWA notice is not waived by the parent's failure to first raise it in the trial court." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 849.)

"The fundamental procedural safeguard in the ICWA 'is a provision for notice, which states in part: "In any involuntary proceeding in a State court, where *the court knows or has reason to know that an Indian child is involved*, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.'"" (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1386 (*Noreen G.*)) The California Legislature has adopted statutes and rules to implement ICWA. Welfare and Institutions Code

section 224.3, subdivision (c), provides: “If the court, social worker, or probation officer knows or has reason to know that an Indian child is involved, the social worker or probation officer is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section 224.2, [and] contacting the Bureau of Indian Affairs and the State Department of Social Services” Although the action before us is not a dependency proceeding as referred to in Welfare and Institutions Code section 224.3, subdivision (a), the California Rules of Court “mandate a duty of inquiry which extends beyond dependency proceedings to other related actions. (*Noreen G.*, at pp. 1386-1387.) California Rules of Court provide that “[t]he court, court-connected investigator, and party seeking a . . . declaration freeing a child from the custody or control of one or both parents, termination of parental rights, or adoption have an affirmative and continuing duty to inquire whether a child is or may be an Indian child in all proceedings identified in rule 5.480.” (Cal. Rules of Court, rule 5.481(a) (rule 5.481).) Rule 5.481(a)(2) provides: “At the first appearance by a parent, Indian custodian, or guardian . . . at the initiation of any guardianship, conservatorship, proceeding for custody under Family Code section 3041, proceeding to terminate parental rights proceeding to declare a child free of the custody and control of one or both parents, or adoption proceeding; the court must order the parent, Indian custodian, or guardian if available, to complete *Parental Notification of Indian Status* (form ICWA-020).” (Italics in original.) “Under the broad

language of rule 5.481, the duty of inquiry attaches to *any* proceeding which may result in termination of parental rights or adoptive placement.” (*Noreen G.*, at p. 1387.)

In *Noreen G.*, *supra*, 181 Cal.App.4th 1359, the trial court granted a petition under Probate Code section 1516.5 and terminated parental rights. (*Noreen G.*, at pp. 1383-1385.) However, the parents appealed, in part, because the trial court failed to comply with the requirements of ICWA. (*Noreen G.*, at p. 1385.) The appellate court observed that “evidence of Indian heritage [was] entirely lacking in the record before [it].” (*Id.* at p. 1388.) However, on appeal, the mother made a claim that one of her ancestors had Seminole Indian heritage. (*Ibid.*) The court determined that “without reversal of the judgment we must make a limited remand with directions to the trial court to effectuate proper inquiry and comply with the notice provisions of the ICWA if Indian heritage is indicated.” (*Id.* at pp. 1389-1390.)

In the instant case, the court did not order father (or mother) to complete a parental notification of Indian status (form ICWA-020), as required by California Rules of Court, rule 5.481. The record only contains an ICWA-020 form signed by Mr. and Mrs. T, stating that the child had no known Indian ancestry. However, there is nothing in the record to indicate that father or mother was asked about their Indian heritage. Mr. and Mrs. T argue that noncompliance with the inquiry requirement was harmless error. They acknowledge that a conditional reversal would be in order “had the father made any mention of possible Indian ancestry over the course of two legal proceedings and the appellate action.” They appear to be asserting that father failed to assert that he has Indian ancestry below or on appeal. However, Mr. and Mrs. T are mistaken. Father has

affirmatively represented on appeal that he has Indian ancestry from his paternal side. In his opening brief, he claims that his sister told him he had Indian ancestry because his father was “Italian and Indian.” Therefore, since father has claimed Indian ancestry on appeal, we must order a limited remand for the trial court to comply with the inquiry and notice provisions of ICWA. (*Noreen G.*, *supra*, 181 Cal.App.4th at pp. 1388-1390.)

DISPOSITION

We order a limited remand with directions to the trial court to effectuate proper inquiry and to comply with the notice provisions of ICWA if Indian heritage is indicated. If, after proper inquiry and notice, a tribe determines the child is an Indian child, father may petition the court to invalidate the termination of parental rights upon a showing that such action violated the provisions of ICWA. If the child is not found to be an Indian child, the judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

MILLER
J.